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US Bank National Association v. Citimortgage Appellant's Brief Dckt. 41252

IN THE SUPREME COURT OF THE STATE OF IDAHO

U.S. BANK NATIONAL ASSOCIATION N.D., Plaintiff-Appellant-Cross Respondent, vs. CITIMORTGAGE, INC., a savings bank organized and existing under the laws of New York, Defendant-Respondent-Cross Appellant.	Supreme Court Docket No. 41252-2013 Blaine County No. 2011-497

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District for the County of Blaine

Honorable Robert J. Elgee, District Judge, Presiding

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the deed of trust foreclosure upon certain real property located in Blaine County, Idaho (the "Subject Property"). The Subject Property is owned by Defendants Herbert and Julie Thomas (the "Thomases"). It is subject to two competing deeds of trust: one held by Plaintiff-Appellant-Cross Respondent U.S. Bank National Association, N.D. ("U.S. Bank"), the other held by Defendant-Respondent-Cross Appellant CitiMortgage, Inc. ("CitiMortgage").

On August 30, 2005, the Thomases opened a $2 million dollar revolving home equity line of credit (HELOC) with U.S. Bank ("U.S. Bank Line of Credit"), secured by a deed of trust upon the Subject Property in favor of U.S. Bank ("U.S. Bank Deed of Trust").

Unbeknownst to U.S. Bank, the Thomases approached CitiMortgage in early November 2005 seeking to refinance existing debt, including the existing balance owed on the U.S. Bank Line of Credit. On November 23, 2005, CitiMortgage extended a $4.99 million loan to the Thomases ("CitiMortgage Loan"), secured by a deed of trust upon the Subject Property in favor of CitiMortgage ("CitiMortgage Deed of Trust").

On November 29, 2005, the title company chosen to close the transaction hand-delivered to U.S. Bank's Ketchum Branch a check for a sum of $1,843,807.40 (the "Check"), funded with a portion of the proceeds of the CitiMortgage Loan.

A HELOC is a revolving line of credit which operates much like a credit card. Paying the account balance does not result in closure of the account; the revolving account remains open and available for future borrowing. Thus, when U.S. Bank received the Check, it simply applied the

Check to the Thomases' U.S. Bank Line of Credit, reducing the balance to zero. The account was left open as required by the terms of the governing HELOC agreement and deed of trust.

CitiMortgage contends that a letter was enclosed with the Check which demanded that U.S. Bank release its deed of trust on the Subject Property (the "Release Demand Letter"). U.S. Bank has no record of receiving the Release Demand Letter and denies ever having received it.

Because U.S. Bank did not receive a demand for reconveyance, it did not release its deed of trust on the Subject Property upon receipt of the Check. Subsequently, the Thomases resumed borrowing on the U.S Bank Line of Credit.

The Thomases eventually defaulted on their obligations under both the U.S. Bank Line of Credit and the CitiMortgage Loan.

In 2011, U.S. Bank learned of the existence of the CitiMortgage Deed of Trust and the alleged Release Demand Letter while preparing to foreclose its deed of trust on the Subject Property. Thus, U.S. Bank instituted judicial foreclosure proceedings to foreclose on its deed of trust and obtain a judicial determination as to its lien priority relative to CitiMortgage.

CitiMortgage has asserted affirmative defenses to the effect that the U.S. Bank Line of Credit was paid and should have been closed in November 2005. Specifically, CitiMortgage contends that U.S. Bank had a duty to release its deed of trust under I.C. § 45-915 and I.C. § 45-1514 which require a deed of trust holder to release its deed of trust upon satisfaction of the underlying debt *and* demand for release. Receipt of the Check is not in dispute. Thus, the sole issue upon which the determination of priority hinges is whether U.S. Bank actually received the Release Demand Letter from the title company (*i.e.*, a demand for release). If U.S. Bank did not receive the Release

Demand Letter, it had no duty to close the U.S. Bank Line of Credit and release its deed of trust; the U.S. Bank Deed of Trust would therefore remain senior to that of CitiMortage. If, however, CitiMortgage proved that U.S. Bank did receive the Release Demand Letter, then U.S. Bank was obligated to release its deed of trust and therefore CitiMortgage would advance to first lien position.

During the course of discovery, it was revealed that the only method employed by the title company to ensure successful hand-delivery in such instances was that demands for reconveyance were "always" stapled to payoff checks. In light of this, whether the Release Demand Letter was stapled to the Check became the single most critical issue of fact in this case.

The District Court disposed of all other issues and thereby essentially limited the subject of the July 2010 trial to the sole issue of whether staple holes were evident in the available images of the processed Check.

At the trial, U.S. Bank elicited the testimony of Keith Powers, the U.S. Bank employee with unrivaled knowledge and experience with check imaging in the banking industry, and with U.S. Bank's check imaging system in particular. Using U.S. Bank's image viewing tools, Mr. Powers demonstrated to the Court that he had engaged in a thorough analysis of the Check images at various resolutions, zoom ratios, and exposures, and concluded that there was no evidence of staple holes in the Check.

On the other hand, CitiMortgage adduced the testimony of Shannon Pearson, a paralegal employed by CitiMortgage's counsel, Pickens Law, P.A. Ms. Pearson has no knowledge or experience with imaging processes and hardware used in the banking industry or in any other application. Over U.S. Bank's objection, Ms. Pearson was permitted to testify as to the results of an

experiment she had conducted to generate new evidence in the case. Ms. Pearson's experiment involved using the Pickens Law photocopy machine to scan a blank check she had stapled and create an image with no visible staple holes.

Despite the obvious disparity in both the quantity and quality of the evidence presented, the District Court found that the Check more likely than not contained staple holes and thus concluded that U.S. Bank had received the Release Demand Letter. The District Court therefore ruled that the CitiMortgage Deed of Trust was in senior position because U.S. Bank was obligated to release its deed of trust upon receipt of the Check and Release Demand Letter.

U.S. Bank appeals to this Court on the basis that the District Court ignored substantial and competent evidence that the Release Demand Letter was not delivered to U.S. Bank, and that the District Court was therefore clearly erroneous in so finding. U.S. Bank also appeals the District Court's rulings that the Release Demand Letter was effective as a demand for reconveyance under I.C. § 45-1203.

B. Relevant Procedural History

The following District Court proceedings bear upon this appeal of the District Court's determination of lien priority:

1. Pleadings

U.S. Bank filed its COMPLAINT on June 17, 2011, naming the Thomases and CitiMortgage as defendants to the action. U.S. Bank sought judgment, *inter alia*, that the U.S. Bank Deed of Trust was senior in priority to the CitiMortgage Deed of Trust.[1] *See* R. 18-26.[2]

[1] U.S. Bank also sought judgment against the Thomases for the amount due and owing under the U.S. Bank Line of

CitiMortgage filed its ANSWER on July 22, 2011, asserting the affirmative defense that its deed of trust is senior to that of U.S. Bank because the U.S. Bank Line of Credit was satisfied.[3] CitiMortgage did not make a counterclaim or seek any affirmative relief whatsoever. *See* R. 30-34.

2. Motions for Summary Judgment and District Court's Orders Limiting Trial Issues Pursuant to Rule 56(d)

Prior to the trial, U.S. Bank and CitiMortgage each moved for summary judgment and, later, partial summary judgment. *See* R. 38-504, 533-684. As a result of these motions, the Court issued three (3) orders[4] limiting trial issues pursuant to IDAHO RULE OF CIVIL PROCEDURE (I.R.C.P.) 56(d). The cumulative effect of these orders limited the factual issues remaining for trial to: (1) whether the Release Demand Letter was delivered by BCT to U.S. Bank; and (2) whether the Release Demand

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Credit. This element of the litigation is not at issue on appeal.

[2] In this brief, the Clerk's Record on Appeal is cited as "R." The Reporter's Transcript on Appeal is cited as "Tr." The exhibits admitted at the trial are cited as "Ex."

[3] CitiMortgage asserted six affirmative defenses in total however it only relied upon the first three to obtain a ruling in CitiMortgage's favor by the District Court. Read together, these three affirmative defenses amount to a single claim that the CitiMortgage Deed of Trust should be superior to the U.S. Bank Deed of Trust because the U.S. Bank Line of Credit was paid and satisfied:

> FIRST AFFIRMATIVE DEFENSE
>
> As a first affirmative defense herein, Defendant alleges that Plaintiff was paid in full accord and satisfaction of an amount due and owing under its Deed of Trust.
>
> SECOND AFFIRMATIVE DEFENSE
>
> As a second affirmative defense herein, Defendant alleges that its Deed of Trust recorded as Instrument No. 529429 has priority over Plaintiff's alleged Deed of Trust.
>
> THIRD AFFIRMATIVE DEFENSE
>
> As a third affirmative defense herein, Defendant alleges that it has lien priority over all encumbrances on the property set forth in Plaintiff's complaint, and any foreclosure would be subject to Defendant's Deed of Trust.

R. 33. CitiMortgage sought no other affirmative relief.

[4] *See* ORDER LIMITING TRIAL ISSUES PURSUANT TO RULE 56(d) ("First Order Limiting Trial Issues," entered February 8, 2012); SECOND ORDER LIMITING TRIAL ISSUES PURSUANT TO RULE 56(d) ("Second Order Limiting Trial Issues", entered May 2, 2012); AND THIRD ORDER LIMITING TRIAL ISSUES PURSUANT TO RULE 56(d) ("Third Order Limiting Trial Issues", entered May 17, 2012).

Letter was stapled to the Check and (3) the issues related to the balance owing by the Thomases to U.S. Bank. *See* R. 515-521; 776-778; 779-781.

3. Stipulations Re: the Thomases

Prior to trial, the parties stipulated to the disposition of the majority of the issues between U.S. Bank and the Thomases. The Court therefore ordered that the Thomases are jointly and severally liable to U.S. bank for unpaid balance of the U.S. Bank Line of Credit; that the Thomases would not be required to appear for the trial on July 10, 2012; and that any deficiency judgment liability of the Thomases to U.S. Bank, including the fair market value of the Subject Property, would be reserved for a later trial date. This narrowed the scope of the trial to: (1) whether the Release Demand Letter was delivered by BCT to U.S. Bank; and (2) whether the Release Demand Letter was stapled to the Check. *See* R. 850-53; 854-57.

4. Stipulation to Admission of Evidence into Record

At the outset of the trial, the parties stipulated that the evidentiary record would include and that the District Court would consider would include all affidavits, exhibits, and documents submitted by both U.S. Bank and CitiMortgage in the case prior to trial. Tr. 118-120.

5. Trial on Lien Priority

As a result of the foregoing orders limiting trial issues, in conjunction with order granting the stipulations regarding the Thomases, the sole issue tried before the District Court at the trial on July 10, 2012, was the relative lien priority between the U.S. Bank Deed of Trust and the CitiMortgage Deed of Trust. The governing issue of disputed fact from which that determination would be made was whether U.S. Bank had received the Release Demand Letter. The substantial majority of the

evidence proffered by U.S. Bank and CitiMortgage pertained to whether or not staple holes were evident on the images of the Check.

At the conclusion of the trial, the District Court took the matter under advisement, pending the submission of post-trial briefs by the parties. Tr. 214:25-215:21.

6. District Court's Ruling on Lien Priority

On September 24, 2012, the District Court entered its FINDINGS OF FACT AND CONCLUSIONS OF LAW. The District Court found that it was "more probable than not that the staple holes were on the Check" and therefore concluded that the Release Demand Letter was stapled to the Check and delivered by BCT on November 29, 2005. Accordingly, the District court ruled that the CitiMortgage Deed of Trust has priority over the U.S. Bank Deed of Trust as a matter of law. *See* R. 1160-73.

7. CitiMortgage Denied Attorney's Fees

Following the District Court's ruling, CitiMortgage applied to recover its attorney's fees and costs against U.S. Bank. After considering the briefs and arguments of the parties, the District Court denied CitiMortgage's application for attorneys' fees and discretionary costs. *See* R. 1359-1364. This ruling is the basis of CitiMortgage's cross-appeal.

8. Subsequent Proceedings and Entry of Final Judgment

On May 21, 2013, the Thomases stipulated to judgment against them as prayed for by U.S. Bank. On August 6, 2013, the District Court entered its AMENDED JUDGMENT AND DECREE OF FORECLOSURE (ORDER OF SALE) against the Thomases and in favor of U.S. Bank. On August 13, 2013, the Court entered its FINAL JUDGMENT, from which U.S. Bank and CitiMortgage now appeal.

C. Statement of Facts

As discussed, the parties stipulated that the affidavits, exhibits, and documents, submitted by the parties prior to the trial would be included into the trial record and considered by the District Court in making its findings of fact. Tr. 118-120. Accordingly, the following statement of facts contains numerous references to documents, exhibits, affidavits, and deposition testimony which is considered to be part of the trial record in this case.

1. U.S. Bank Line of Credit

On or about August 30, 2005, Herbert T. Thomas and Julie A. Thomas, then husband and wife,[5] opened a U.S. Bank Home Equity Line of Credit with a maximum balance of $2 million (hereinbefore defined as the "U.S. Bank Line of Credit or U.S. Bank HELOC").[6] Pursuant to the terms of a Deed Of Trust dated August 30, 2005, and recorded on September 29, 2005, as Blaine County Instrument No. 526727 (hereinbefore defined as the "U.S. Bank Deed of Trust"), the U.S. Bank Line of Credit is secured against certain real property owned by the Thomases located at 104 Grey Eagle, Sun Valley, Idaho 83353 (hereinbefore defined as the "Subject Property").[7] *See* R.

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[5] The Thomases have since divorced.

[6] To obtain this U.S. Bank Line of Credit, the Thomases made, executed, and delivered to U.S. Bank their U.S. Bank Equiline Agreement in an amount not to exceed the sum of $2,000,000.00 bearing interest thereon at the initial rate of 6.50 percent per annum payable in monthly installment payments. *See* R. 57-62.

[7] The legal description of the Subject Property is:

> Lot 15AA of JUNE DAY SUBDIVISION LOT 15AA & LOT 16A, according to the official plat thereof, recorded March 8, 2002, as Instrument No. 462452, together with a 1/3 interest in Lot G of JUNE DAY SUBDIVISION, recorded May 29, 1980, as Instrument No. 203843, records of Blaine County, Idaho.
>
> The foregoing legal description is also known as:
>
> Lot 15A AND AN UNDIVIDED 1/3 INTEREST IN LOT G OF JUNE DAY SUBDIVISION LOT 15A ACCORDING TO THE OFFICIAL PLAT THEREOF, RECORDED AS INSTRUMENT NO. 448900, RECORDS OF BLAINE COUNTY, IDAHO.

1161-62.

A HELOC such as the U.S. Bank Line of Credit differs from a conventional home equity loan in that the borrower is not advanced the entire sum up front, but uses a line of credit to borrow sums that total no more than the credit limit, similar to a credit card.[8] Paying the balance of a HELOC such as the U.S. Bank Line of credit down to zero does not result in closure of the account or reconveyance of the security unless a request for reconveyance is received by U.S. Bank. This is specifically stated in the duly-recorded U.S. Bank Deed of Trust:

> 19. LINE OF CREDIT. The Secured Debt includes a revolving line of credit. Although the Secured Debt may be reduced to a zero balance, this Security instrument will remain in effect until released.

R. 67.

2. CitiMortgage Loan

In September 2005, the Thomases approached CitiMortgage seeking to borrow funds to refinance various debts, including a loan secured by the Sun Valley residence held by PHH Mortgage Services, a mortgage on a Seattle residence also held by PHH Mortgage Services, and the balance on the U.S. Bank Line of Credit. On or about November 23, 2005, the Thomases executed a Fixed/Adjustable Rate Note in favor of CitiMortgage under which CitiMortgage lent the Thomases $4,990,000.00 (hereinbefore defined as the "CitiMortgage Loan"). The CitiMortgage Loan was also secured against the Subject Property by Deed of Trust dated November 29, 2005, and recorded on September 29, 2005, as Blaine County Instrument No. 529429 (hereinbefore defined as the "CitiMortgage Bank Deed of Trust"). *See* R. 296-321.

[8] In fact, funds are drawn on the line of credit by using a credit card linked to the account.

Blaine County Title Associates, LP ("BCT") was retained by CitiMortgage and the Thomases to close the CitiMortgage Loan and issue a Commitment for Title Insurance to CitiMortgage.[9] The agreement between CitiMortgage and BCT provided that the proceeds of the CitiMortgage Loan were to be directed by BCT to PHH Mortgage Services and U.S. Bank in order to pay off and terminate the Thomases' aforementioned secured debts. *See* R. 73-104. Thus, BCT was required to contact the foregoing lenders to ascertain what was necessary to pay off and close the loans. *See id.*

On or about November 22, 2005, BCT contacted U.S. Bank's Ketchum Branch to obtain the balance of the U.S. Bank Line of Credit. R. 75. In response, Lisa Guinn, U.S. Bank's Ketchum Branch Manager sent to BCT a computer screenshot of an "Account Inquiry" of the U.S. Bank Line of Credit. *Id.* This screen shot shows the principal balance and accrued interest as well as the per diem on the U.S. Bank Line of Credit at the time of the last inquiry. *See* R. 86.

As Lisa Guinn verified in her Affidavit dated November 17, 2011, it was not uncommon at the time for title companies to ask for a screen shot of loan information for a borrower at the Bank in order to confirm the status of the loan at a particular point in time. Lisa Guinn also confirms in her Affidavit that it was perfectly clear, and the title companies all understood, including specifically BCT, that the screen shot with the status of the loan was not a payoff statement, because a payoff statement from the Bank must be obtained through the loan operations center outside of Idaho. A formal payoff statement which would necessarily include other amounts that would be due at the time of the payoff of the loan, including any prepayment penalties, late fees, reconveyance fees,

[9] U.S. Bank was not a party to the CitiMortgage Loan transaction of the escrow agreement between the Thomases, CitiMortgage, and BCT. U.S. Bank knew nothing about this transaction.

interest to the payoff date of closing, etc. For this reason the screen shot was not intended to be, nor was it, a payoff statement. *See* R. 196-206.

U.S. Bank was unaware of the CitiMortgage Loan transaction and was not a party thereto. Nor was U.S. Bank a party to the escrow arrangement between BCT, the Thomases, and CitiMortgage. The only written communication between U.S. Bank and BCT at the time of the CitiMortgage Loan was the above-described "Account Inquiry" screenshot sent by Lisa Guinn, which was not an unusual event since many line of credit borrowers will, from time to time, pay their lines of credit to zero. *See id.*

On November 29, 2005, BCT hand-delivered to U.S. Bank's Ketchum Branch a check in the amount of $1,843,807.40 (hereinbefore defined as the "Check;" *see* images in Ex. 56).

U.S Bank processed the Check and applied it to the Thomases' U.S. Bank Line of Credit to reduce the balance to zero. U.S. Bank deposited excess funds in the Thomases' U.S. Bank checking account because the amount of the Check exceeded the balance of the U.S. Bank Line of Credit. It is not unusual in the credit card or the line of credit context for an account to be paid off to zero. As stated hereinabove, simply paying down the balance on a HELOC does not cancel the credit line because it is the very nature of a revolving line of credit that a borrower can pay it off, but then will have access to the line for continued borrowing.

On November 29, 2005, CitiMortgage recorded through BCT its second priority Deed of Trust. *See* R. 307-17. The priority date of the U.S. Bank Deed of Trust is September 29, 2005, while the priority date of the CitiMortgage Deed of Trust is November 29, 2005. *Cf.* R. 63-69.

Following the CitiMortgage Loan transaction, the Thomases resumed borrowing on their

U.S. Bank Line of Credit, ultimately incurring a balance due in excess of $2 million. *See* R. 396-412. In the nearly six years that passed before the instant litigation commenced, neither CitiMortgage, nor BCT, nor the Thomases ever contacted U.S. Bank in order to cancel the U.S. Bank Line of Credit or obtain reconveyance of the U.S. Bank Deed of Trust to ensure that CitiMortgage was in first lien position on the Subject Property.

3. Thomases Default

The Thomases ultimately defaulted on their obligations of repayment under both the U.S. Bank Line of Credit and the CitiMortgage Loan.

4. Pre-Litigation Investigation by U.S. Bank

Following the Thomases' default, U.S. Bank transferred management over the Thomases' U.S. Bank Line of Credit account to its Default Management Group in order to prepare to foreclose the U.S. Bank Deed of Trust. A routine review of the account was conducted by the Default Management Group which identified that a deed of trust had been recorded in favor of CitiMortgage (the CitiMortgage Deed of Trust) on the same day that U.S. Bank had received a check for $1,843,807.40 (the Check). Accordingly, U.S. Bank contacted BCT in February 2011, to inquire as to the circumstances of the Check delivered on November 29, 2005, and ascertain whether it was related to the CitiMortgage Deed of Trust. It was then that U.S. Bank learned that, in addition to the Check delivered to U.S. Bank's Ketchum Branch on November 29, 2005, BCT contended that it had also delivered a letter demanding reconveyance (hereinbefore defined as the "Release Demand Letter," *see* R. 193). A copy of the purported Release Demand Letter was sent to U.S. Bank and was thereafter for the first time entered into U.S. Bank's records. *See* R. 186-95.

Recognizing that CitiMortgage was making a competing security interest claim in the Subject Property, U.S. Bank initiated judicial foreclosure proceedings.

5. The Release Demand Letter

CitiMortgage asserts payment as an affirmative defense. *See* R. 33. This affirmative defense is entirely predicated on the contention that the Release Demand Letter was delivered the Release Demand Letter to U.S. Bank's Ketchum Branch along with the Check on November 29, 2005.

The copy of the Release Demand Letter provided by BCT to U.S. Bank in February 2011 is undated and does not set out the disclosures required under I.C. § 45-1203. *See* R. 93.

As explained hereinafter, BCT claims that the Check was *stapled* to the Release Demand Lettter; no other proof of service was generated. Thus to prove its affirmative defense that the Release Demand Letter was delivered, CitiMortgage contends that there are visible staple holes on the images of the Check in the record. U.S. Bank contends that the Release Demand Letter was not delivered and that there are no visible staple holes on the Check images.

The issue of whether the Check shows staple holes was the primary issue of fact tried by the District Court on July 10, 2012, and it forms the primary basis the instant appeal. The following facts are germane to this determination:

i. BCT's Procedures: Payoff checks "always" stapled to demands for reconveyance

CitiMortgage's entire affirmative defense, that the Release Demand Letter was delivered, rests on the existence of two staple holes in the Check. BCT personnel testified unanimously at their depositions in this matter that BCT has always stapled payoff checks to demands for reconveyance.

See R. 697 (Seal Dep. 69:04-22); R. 702, 705 (Osenga Dep. 28:20-29:05, 25:18-22). The stapling was apparently done to ensure that checks and reconveyance demands were delivered together. R. 697 (Seal Dep. 69:18-21). Staple holes would ostensibly prove that a demand for reconveyance was received if a payoff check was cashed.

ii. BCT's Procedures: No formal delivery procedures; no proof of delivery

It is uncontradicted that beyond staples, BCT had no other methods or procedures to ensure that the hand-delivery of a demand for reconveyance was carried out successfully:

> Q. Did Blaine County Title ever request delivery receipts, or any sort of proof of service when it delivers letters by hand?
>
> A. No.
>
> Q. Does Blaine County Title have any procedures or policies in place to make sure that a given document reaches its destination when hand delivered?
>
> A. No.

R. 720 (Fauth Dep. 45:04-13); *see also* R. 693 (Seal Dep. 64:18-65:22). Whoever from BCT's office happened to be running an errand at any particular time would take a delivery. R. 693 (Seal Dep. 65). The closing agent's assistant testified that she simply would have put it "in a box on the front desk" and assumed it had gone out. R. 701 (Osenga Dep. 24:21-25:01).

Despite having no procedures to ensure delivery of documents locally, BCT President Darryl Fauth testified that it is BCT's policy to send *out-of-town* deliveries via Federal Express rather than standard U.S. Mail for the reasons that "we have a tracking number to track the package if its lost and, therefore, it's just a lot more reliable to depend on that the payoff check will arrive that way." R. 719 (Fauth Dep. 44:18-21).

BCT's *ad hoc* hand-delivery procedures are riskier where BCT is closing a revolving line of

credit such as a home equity loan. Mr. Fauth testified the processing of closing these sorts of accounts presents a number of unique challenges to BCT. *See* R. 722 (Fauth Dep. 55:07-56:25).

In any event, however, since BCT generates no records in connection with its hand-deliveries, the existence of staple marks on BCT checks operates as BCT's only means of proving service.

iii. U.S. Bank's Procedures for Receiving Checks and Loan Documentation

While BCT employed no ascertainable methods to ensure delivery of important documents, U.S. Bank had promulgated and employed very specific and regular procedures for receiving and recording such documents. *See* R. 619-24. These uncontradicted facts were summarized in the District Court's FINDINGS OF FACT AND CONCLUSIONS OF LAW:

> According to U.S. Bank's procedures, any documents that are stapled to a check are removed from the check at the receiving bank. Here that means that if the "Release Demand Letter" prepared by BCT was stapled to the Check for $1.8 million, and it was delivered to the U.S. Bank in Ketchum, the letter and the Check would have been separated upon arrival at U.S. Bank or soon thereafter. A release demand letter is an "Ancillary Document" that would have been placed into a transmittal bag at U.S. Bank in Ketchum known as a "Green Bag" and delivered to Fargo, North Dakota for imaging at the U.S. Bank Imaging Processing Center. A check is a "Proof Document" that would have been separated from the release demand letter, processed in the Ketchum, Idaho branch of U.S. Bank, and then placed into a clear transmittal bag known as a "Proof Bag" or "Clear Bag" and delivered to Portland, Oregon where it would be scanned by the U.S. Bank Item Processing Center.

R. 1165. The original hard copy of the Release Demand Letter would have been placed in the hard copy file for the Thomases' U.S. Bank Line of Credit kept at the U.S. Bank Ketchum Branch. R. 628. These procedures work to ensure that U.S. Bank retains both hard copies and electronic copies of the loan documents it receives.

The Check was successfully delivered to Portland for processing. R. 628. Had the Release

Demand Letter also been received, it would have been placed in a "Green Bag" and then placed in a sealed-tamper evident interoffice mailbag to be delivered to a U.S. Bank Imaging Center in Fargo, North Dakota. R. 619-24.

Thus to prove its affirmative defense, it is CitiMortgage's burden to prove that BCT's non-existent procedures for delivery were successful in delivering the Release Demand Letter, while U.S. Bank's regular corporate policies failed at every stage of the process with regard to the Release Demand Letter while simultaneously succeeding with regard to the Check.

6. Analyzing Images of the Check for Existence of Staple Holes

i. Check Images Available For Analysis

BCT personnel testified that they believed that the Release Demand Letter must have been delivered because they "always" stapled such letters to payoff checks and therefore if there were staple holes in the Check then it must have been delivered. *See* R. 697 (Seal Dep. 69); R. 702, 705 (Osenga Dep. 25, 28). Accordingly, the security of the debt in excess of $2 million owed to U.S. Bank by the Thomases hinges entirely upon the existence of these staple holes.

There are two existing images[10] of the Check in the record. *See* Ex. 56. The first image was created by U.S. Bank's imaging system when it processed the Check. Tr. 163:05. The second image was created by the bank upon which the Check was drawn: First Bank of Idaho. Tr. 164:10-13. First Bank of Idaho was later merged with U.S. Bank, thus U.S. Bank has both its own image and First Bank of Idaho's image of the Check in its system. Tr. 147:17-21. These images are the best

[10] The original (i.e., physical) Check is no longer in existence; neither BCT nor any party to this litigation is in possession of the physical original, and it is therefore presumed to have been destroyed.

evidence from which to determine if the Check contained the staple holes required to prove delivery of the Check and therefore CitiMortgage's affirmative defense of payment.

ii. Staple Holes: Testimony of U.S. Bank's Keith Powers

Whether these images showed staple holes was the primary issue at the July 10, 2012, trial. Thus, U.S. Bank's key witness was Keith J. Powers, U.S. Bank's Vice President, Manager, Check Image Compliance & Planning. Mr. Powers has twenty-five (25) years of experience analyzing check images and is responsible for ensuring that U.S. Bank's Imaging Processing Software is properly configured to comply with industry established standards and practices. Ex. 53; R. 636-53. Mr. Powers engaged in a thorough analysis of the Check which was first set forth in the AFFIDAVIT OF KEITH J. POWERS IN SUPPORT OF PLAINTIFF U.S BANK'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT. *See* R. 636-53. The Powers Affidavit sets forth these key and uncontradicted facts:

- The Check image was captured by an IBM 3897 Mod 4 High Speed Image 150 watt Camera and stored for viewing in the TIFF image format at 200 dpi (dot pixels per square inch). The combination of the IBM Camera capturing a check image at 150 watts and creating a file at 200 dpi viewed under native and high definition viewing will expose a hole as small as a pin or the presence of a previously stapled document on a check. R. 640.

- If the Check had been stapled, it would be visible within the scanned check image. Mr. Powers has viewed many other checks that do demonstrate the presence of staple marks. Any staple marks will necessarily be visible on the image of both the front and back of the check. R. 641.

- Mr. Powers viewed the Check using the standard U.S. Bank Image Retrieval System which displays the PNG (portable network graphic) format of TIFF images. Mr. Powers viewed the Check in the following screen resolutions: 800x600 pixels, 1024x768 pixels, 1280x800. This was done to ensure that multiple viewing variants were taken into consideration in forming a conclusion. R. 640.

- Viewing the Check image in multiple zoom and Reverse Black to White views

ensures that Mr. Powers took multiple viewing variants into consideration prior to reaching a conclusive opinion. Thus, Mr. Powers viewed the Check with the following views: Native View (100% Zoom) both front and rear image; Native View with (150% Zoom) both front and rear image; Native View with (200% Zoom) both front and rear image; Native View with (300% Zoom) both front and rear image; Native View with (400% Zoom) both front and rear image; Native View with (600% Zoom) both front and rear image; Native View with (800% Zoom) both front and rear image; Reverse Black to White (100% Zoom) both front and rear image; Reverse Black to White (150% Zoom) both front and rear image; Reverse Black to (White 200%) Zoom both front and rear image; Reverse Black to (White 300%) Zoom both front and rear image; Reverse Black to White (400% Zoom) both front and rear image; Reverse Black to (White 600%) Zoom both front and rear image; Reverse Black to White (800% Zoom) both front and rear image. *Id.*

- For comparison, the Powers Affidavit also included as exhibits images of other checks which clearly demonstrated the presence of staple holes. *See* R. 649-653.

After thoroughly examining the images of both the front and back of the Check according to the procedures described above, Mr. Powers concluded based on his unrivaled experience with check images in U.S. Bank's system that neither the front nor back image demonstrates the presence of any staple marks. R. 641.

At the trial, Mr. Powers testified as to the process of using U.S. Bank's Image Retrieval System to look at the Check. Mr. Powers took screen shots at every stage of the process; the screenshots were assembled in order and admitted into evidence as Plaintiff's Exhibit 56. Mr. Powers demonstrated how he used the tools of the Image Retrieval Systems to look at the two existing images of the Check. Mr. Powers showed the Court the front and back side of both images of the Check under the following settings: native view at 100% zoom ratio; black/white reverse at 100% zoom ratio; native view at 200% zoom ratio; black/white reverse at 200% zoom ratio; native view at 400% zoom ratio; and black/white reverse at 400% zoom ratio. *See* Tr. 143-71; Ex. 56.

Mr. Powers testified that upon examination of both images using the foregoing methods, his unqualified conclusion that there were no staple holes present in the images. *See* Tr. 143-71. Particularly significant was Mr. Powers' view of the images using the black/white reverse setting whereby "it takes everything white and turns it black and everything black and turns it white and allows for an enhanced view on the detail of the check." Tr. 159:23-25. Mr. Powers explained why this would be likely to reveal the existence of any holes in the Check:

> Q. On a black/white reverse version, why would the holes be pronounced white?
>
> A. The coffin or the box that the lenses reside in is designed specifically to be exclusive of any foreign light, and when the camera flashes, most everything is exaggerated. If there's a tear or a whole in the check, the absence of any other light is usually exaggerated by the camera light, and I would expect to see more in the event of a staple on this item.

Tr. 161:07-15.

Also significant is Mr. Powers' examination of images the back side of the Check. Obviously any staple holes which were apparent on the front of the Check would have corresponding holes in precisely the same locations on the back side of the Check. Tr. 158:05-09; R. 641. Mr. Powers was unable to identify evidence of holes in corresponding locations on both sides of the Check. *See id.* Accordingly, the best evidence available after a thorough examination of the scanned Check image maintained in the records of U.S. Bank shows that the check was never stapled to any letter or other writing. *See* Tr. 123-171; *see also* R. 636-53.

iii. Staple Holes: Testimony of Pickens Law Paralegal Shannon Pearson

CitiMortgage's key witness was Shannon Pearson, a paralegal employed by CitiMortgage's attorneys, Pickens Law, P.A. Over U.S. Bank's objections, *see* Tr. 191-94, CitiMortgage was

permitted to elicit testimony from Ms. Pearson with regard to an "experiment" she had conducted for the purpose of generating trial testimony using the Pickens Law office photocopier/scanner and a Pickens Law blank check. Ms. Pearson testified that she had taken a blank check, put staple holes in it, and then scanned it into the Pickens Law, P.A. computer system. Tr. 189:02-10. No staple holes were evident on the image Pickens Law check. Tr. 197:04-06; *see* Ex. 516.

Ms. Pearson did not use the same equipment to create the image of the Pickens Law check as was used to create the images of the Check at issue in this litigation. *See* Tr. 202:11-12; *cf.* Tr. 135:14-25. She testified that she has no technical knowledge or training of equipment relating to imaging or photocopying, nor any training in check processing. Tr. 200:20-201:03. She had no ability to look at the image of the Pickens Law checks in black/white reverse. Tr. 202:03-06. She did not know the model or manufacturing year of the machine used to create the image. Tr. 202:09-14. She could not state the wattage of the bulb used, Tr. 202:22-24, the lumens produced by the bulb, 204:04-06, or the lens speed of the machine's camera, 202:25-203:01. She was unfamiliar with the concept of image fidelity. Tr. 203:19-20. She only used one method to remove the staple and did not establish that her method was the same as the method which U.S. Bank would have used to remove a staple. *See* Tr. 204:15-20. Nor did she establish that the paper that she used was of the same weight to the Check. Tr. 204:07-12.

Significantly, Ms. Pearson did not offer any opinion or conclusion whatsoever pertaining to the Check at issue. *See* Tr. 187-206.

U.S. Bank objected to Ms. Pearson's testimony, but was overruled. As discussed hereinafter, her testimony was unqualified, irrelevant, inadmissible, and should not have been considered by the

District Court. *See* p. 33-40 *infra*.

7. Other Facts Which Show That Release Demand Letter Was Not Delivered

Staple marks are clearly evident and distinct from dust specks on the comparative bank-imaged checks provided by U.S. Bank. As discussed, U.S. Bank put into evidence two comparison checks which show that staple marks are clearly distinguishable from dust specs on bank-imaged checks. *See* R. 649-653. CitiMortgage did not put any contradicting evidence in the record.

No U.S. Bank employee has been located who has any memory of receiving the Release Demand Letter. U.S. Bank submitted into evidence the affidavits of several employees working at U.S. Bank's Ketchum Branch on November 29, 2005. Each employee testified in their affidavit that they had no memory of receiving the Release Demand Letter. *See* R. 376-79, 419-30.

No one at BCT recalls delivering the Release Demand Letter. It is also uncontradicted that no BCT employee had any memory of delivering the Release Demand Letter. R. 694-96 (Seal Dep. 66-67); R. 703 (Osenga Dep. 26:02-05); R. 715 (Fauth Dep. 28:24-29:02). Furthermore, BCT does not know what employee would have delivered if it were delivered. *See id.*

The Release Demand Letter is undated. BCT President Darryl Fauth testified that a probable reason that the Release Demand Letter is undated is that its preparer was too hurried to notice a possible computer glitch. R. 717 (Fauth Dep. 35:10-23). This is likely because 2005 was an extremely busy year for BCT. *See* R. 714-15 (Fauth Dep. 25-26).

BCT was conducting more transactions than at any time in its history at the time in question. 2005 was the height of the real estate boom and BCT was conducting more transactions than at any other time in its history in terms of both dollar amount and transaction volume. R. 714-15 (Fauth

Dep. 25-26), 749 (Kludt Dep. 17). During this period, BCT employed approximately twelve (12) persons, compared to only four (4) today. R. 714. Mr. Fauth also estimates that BCT was processing between 400 and 600 transactions each year during this period, compared to only 200 to 300 at the time of his deposition in 2011. *Id.* This likely explains why BCT made a number of conspicuous errors, such as failing to obtain a formal payoff statement from U.S. Bank.

BCT obtained a formal payoff statement from PHH Mortgage Services, but not U.S. Bank. It is uncontradicted that BCT never requested or received from U.S. Bank a formal payoff statement, but only relied upon a screen shot from the computer at U.S. Bank. However, BCT did obtain formal payoff letter from PHH Mortgage Services, the other lender holding a deed of trust on the Thomases' Sun Valley property, which was a proper payoff statement. R. 755-56.

BCT's haste and inattention to detail with regard to the U.S. Bank payoff also explains why BCT never followed up on its purported request for reconveyance to U.S. Bank.

BCT never took any subsequent action to obtain reconveyance of the U.S. Bank Deed of Trust. It is uncontradicted that in the nearly six (6) years between November 29, 2005, and the date that U.S. Bank instituted this litigation, BCT never contacted U.S. Bank to obtain reconveyance of the Deed of Trust. And yet in other situations where a lender has not reconveyed a deed of trust as requested, BCT's title department has followed up to ensure reconveyance. R. 720 (Fauth Dep. 48:19-49:25).

Nor did BCT act to compel reconveyance under I.C. § 45-1203 If BCT had delivered a demand for reconveyance to U.S. Bank and received no response within sixty (60) days, then under I.C. § 45-1203 BCT had the right and obligation to unilaterally record a reconveyance. BCT failed

to do so. The inference to be drawn from this is that no demand for reconveyance was made and thus BCT was never entitled to reconvey under Section 45-1203.

BCT's failures to properly close the CitiMortgage Loan are part and parcel of the fact that BCT lacked proper policies and procedures such as would ensure delivery of a demand for reconveyance. *See* p. 14, *infra*. Given BCT's lack of procedures, it is unsurprising that BCT has occasionally failed to properly deliver other important documents.

Problems with BCT's hand-delivery of documents are not without precedent. Mr. Fauth testified at his deposition that, on occasion, BCT has failed to properly deliver documents to third parties. There have been occasions where BCT forgot or failed to send a required document to another party. R. 720 (Fauth Dep. 46:24-47:14). There have been occasions where hand deliveries resulted in the delivery of a mistaken document to another party. R. 720 (Fauth Dep. 47:18-21). And there have been occasions where, by mistake or neglect on the part of BCT, hand-delivery of a necessary document to another party did not occur. R. 720 (Fauth Dep. 47:22-48:18). Accordingly, the failure of BCT to deliver the Release Demand Letter in this case is not a failure which is isolated or remarkable.

BCT was under pressure to quickly close the CitiMortgage Loan Transaction. The interest rate lock of the Thomases on the proposed CitiMortgage loan commitment had expired and the Thomases were paying expensive extension fees and thus there was great pressure to close the refinance transaction as quickly as possible. R. 765- 67 (*see* ¶ 10 "Expiration of Commitment).

Because of its haste and lack of procedures, BCT failed to generate any proof whatsoever that it delivered the Release Demand Letter. While BCT had no procedures for delivering the

Release Demand Letter, the record is replete with evidence regarding U.S. Bank's thorough procedures for receiving such documents. *See* p. 15, *infra*.

ISSUES ON APPEAL

A. Did the District Court commit clear error by finding that U.S. Bank actually received the Release Demand Letter from Blaine County Title?

B. Was the Release Demand Letter ineffective as a demand for reconveyance for failure to comply with IDAHO CODE (I.C.) § 45-1203?

STANDARD OF REVIEW ON APPEAL

The Court's review is limited "to a determination of whether the evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law." *Sims v. Daker*, 154 Idaho 975, 303 P.3d 1231, 1233 (2013). This Court applies a *de novo* standard to legal questions and a clear error standard to findings of fact. *Herrera v. Estay*, 146 Idaho 674, 679, 201 P.3d 647, 652 (2009).

When reviewing a trial court's conclusions of law, "this Court is not bound by the legal conclusions of the trial court, but may draw its own conclusions from the facts presented." *Steuerer v. Richards*, 155 Idaho 280, 311 P.3d 292, 294 (2013).

However, this Court cannot set aside a trial court's findings of fact unless they are clearly erroneous. IDAHO RULE OF I.R.C.P. 52(a); *Kennedy v. Schneider*, 151 Idaho 440, 442, 259 P.3d 586, 588 (2011). In this regard, U.S. Bank recognizes that as Appellant, it faces a deferential standard of review. Findings of fact which are supported by substantial and competent, though conflicting, evidence, are not clearly erroneous and may not be disturbed on appeal. *Id.*

The failure of a trial court to make findings upon each and every material issue arising from the pleadings, upon which proof is offered, will necessitate a remand for additional findings, unless such findings would not affect the judgment entered. *Perry Plumbing Co. v. Schuler*, 96 Idaho 494, 497, 531 P.2d 584, 587 (1975). "Under the restrained standard of clear error customarily applied to factual issues, a factual finding will not be deemed clearly erroneous unless, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *State, Dep't of Health & Welfare v. Roe*, 139 Idaho 18, 21, 72 P.3d 858, 861 (2003).

ARGUMENT

The District Court committed clear error in finding that U.S. Bank Received the Release Demand Letter on November 29, 2005. Even if U.S. Bank did receive the Release Demand Letter, it was ineffective as a demand for reconveyance for failure to comply with I.C. § 45-1203.

A. The District Court committed clear error finding that U.S. Bank received the Release Demand Letter on November 29, 2005.

CitiMortgage did not assert a counterclaim against U.S. Bank. Rather, it asserted the affirmative defense that the CitiMortgage Deed of Trust should be superior to the U.S. Bank Deed of Trust because the U.S. Bank Line of Credit was paid and satisfied. CitiMortgage relies upon I.C. §§ 45-915 and 45-1514, which require reconveyance of a deed of trust upon satisfaction of the underlying debt *and* a subsequent demand for reconveyance.[11] It is undisputed that the Check was delivered (*i.e.*, "satisfaction of the underlying debt"). Accordingly, whether CitiMortgage may prevail in this matter depends entirely upon whether it successfully proved its sole affirmative

[11] I.C. § 45-915 is invoked into the deed of trust context via I.C. § 45-1514. The statutes are to be read *in pari materia*. *See Brinton v. Height*, 125 Idaho 324, 332, 870 P.2d 677, 685 (1994).

defense that a "demand for reconveyance" was made by delivery of the Release Demand Letter.

The District Court committed clear error in finding that CitiMortgage had indeed proven delivery of the Release Demand Letter. Specifically, the District Court erred in (1) failing to consider critical evidence adduced by U.S. Bank; (2) relying on evidence not in the record; (3) failing to properly allocate the burden of proof upon CitiMortgage to prove delivery of the Release Demand Letter; (4) improperly admitting and considering the testimony of Shannon Pearson; and (5) failing to give due weight to U.S. Bank's uncontradicted evidence that the Release Demand Letter was not delivered. Moreover, the clear weight of the evidence shows that the Release Demand Letter was not stapled to the Check and was not delivered.

1. The District Court failed to consider critical evidence adduced by U.S. Bank.

The District Court's decision is not supported by substantial and competent evidence because the District Court failed to notice and consider crucial relevant evidence. In its FINDINGS OF FACT AND CONCLUSIONS OF LAW, the District Court states multiple times that U.S. Bank did not present evidence of what images of checks *with* staple holes would look like. R. 1164-65 at ¶ 16 ("U.S. Bank did not present evidence of any comparisons... or what staple holes might look like on processed checks."); R. 1166 at ¶ 19 ("Although Mr. Powers testified that staple holes were much more pronounced than dust specks on an imaged check, no visual evidence of the difference was presented to the Court by U.S. Bank.").

However, U.S. Bank did present evidence of what stapled check images look like, which was apparently not noticed by the Court. As previously discussed, the Powers Affidavit, R. 636-53, stated as follows:

> 17. If the Check (EXHIBIT "B") had been stapled, it would be visible within the scanned check image. I have viewed many other checks that do demonstrate the presence of staple marks. For example, true and accurate copies of images of two different checks that do demonstrate the presence of staple marks are attached hereto as EXHIBIT "C" and "D" (these images have been redacted). The presence of staple marks is clearly visible on the top-left corner of the front side of both checks. Reciprocal holes are visible on the back of both checks.

R. 641. The check images attached as EXHIBIT(s) "C" and "D" to the Powers Affidavit very clearly show that staple holes on the upper left-hand corners of the imaged checks are easily distinguished from dust specs. *See* R. 649-53. It is incumbent upon the court sitting as the trier of fact to consider and weigh all admissible evidence in rendering its findings. *Trunnell v. Fergel*, 153 Idaho 68, 70, 278 P.3d 938, 940 (2012) ("...it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses..."); *see also Coombs v. Curnow*, 148 Idaho 129, 138, 219 P.3d 453, 462 (2009) ("Whether competent or incompetent, **all evidence** submitted to the jury must be considered by the court in ruling on a motion for [j.n.o.v.], and such a judgment cannot be entered on a diminished record after the elimination of incompetent evidence.") (emphasis added); *S.H. Kress & Co. v. Godman*, 95 Idaho 614, 615, 515 P.2d 561, 562 (1973) ("Any involuntary dismissal may be granted by the court in a jury trial only after it considers all the evidence and inferences arising therefrom in the light most favorable to the plaintiff."); *Sivak v. State*, 112 Idaho 197, 201, 731 P.2d 192, 196 (1986) (capital sentencing judge but may not give relevant mitigating evidence no weight by excluding such evidence from consideration).

The foregoing comparative images are critical and uncontradicted evidence that staple holes in an imaged check would be patently apparent. The District Court's findings of fact cannot be based on substantial and competent evidence without considering and weighing this evidence.

2. The District Court relied on facts not in evidence.

The District Court's findings of fact are not supported by substantial and competent evidence because the District Court relied on facts not in the record.

A district court's findings must be supported by substantial and competent evidence. *Kennedy*, 151 Idaho at 442, 259 P.3d at 588. Accordingly, the trier of fact may not rely upon facts not in evidence. *See, e.g., State v. Babb*, 136 Idaho 95, 99, 29 P.3d 406, 410 (Ct. App. 2001) ("In this circumstance, where the district court erroneously relied upon alleged facts that were not shown by the State's evidence and did not rule on a proffer of defense evidence, we deem it appropriate to vacate the district court's order and remand for a new suppression hearing."); *see also State v. Branigh*, 36427, 2013 WL 3718751 (Idaho Ct. App. July 17, 2013) ("It constitutes misconduct for a prosecutor to place before the jury facts not in evidence."). Further, it can be inferred from IDAHO RULE OF EVIDENCE 605 ("The judge presiding at the trial may not testify in that trial as a witness.") that a trial court may not consider facts generated by the court itself.

In this case, the District Court's finding that the Release Demand Letter was received is substantially based upon two "facts" which are not in evidence. First, in the FINDINGS OF FACT AND CONCLUSIONS OF LAW at ¶ 22, the District Court offered the unattested notion that U.S. Bank's imaging machinery might have "filled" the staple holes:

> Although Mr. Powers explained U.S. Bank's imaging system, the evidence fails to explain how checks are physically moved through the "coffin" or other equipment when they are imaged. **If they are pressed between rollers at any stage, which seems likely, staple holes could be refilled with existing paper.**

R. 1167 at ¶ 22 (emphasis added). Neither U.S. Bank nor CitiMortgage adduced any evidence to suggest that passing through the coffin might cause paper shards to refill the staple holes.

The second fact not in the record pertains to the testimony of Pickens Law paralegal Shannon Pearson. As discussed hereinafter, Ms. Pearson testified as to the results of an experiment that she conducted. However, Ms. Pearson never ultimately offered any conclusion as to whether her experiment had any bearing on whether the images of the Check at issue had staple holes. To be clear: at no point during Ms. Pearson's testimony does she discuss the actual Check at issue or whether it may or may not have had staple holes when it was imaged. *See* Tr. 187-206.

Findings which rely on facts not in the record cannot be based on substantial and competent evidence.

3. The District Court did not properly consider the burden of proof in this case and allocate to CitiMortgage the burden of proving its affirmative defense.

The burden of proof is of critical importance in a case such of this, wherein $2 million hinges upon the disposition of an extremely narrow factual issue. "[W]here there is any doubt on which side the evidence preponderates, the party having the burden of proof fails upon that issue." *Whalen v. Vallier*, 46 Idaho 181, 266 P. 1089, 1092 (1928). In this instance, the burden of proving delivery of the Release Demand Letter must be placed upon CitiMortgage. U.S. Bank contends that the District Court did not properly allocate this burden of proof to CitiMortgage.

i. As the party asserting the affirmative defense, CitiMortgage has the burden of proving delivery of the Release Demand Letter.

It is well established that the burden of proving an affirmative defense is on the pleader thereof. *Harman v. Nw. Mut. Life Ins. Co.*, 91 Idaho 719, 721, 429 P.2d 849, 851 (1967); *see also, e.g., Pace v. Hymas*, 111 Idaho 581, 586, 726 P.2d 693, 698 (1986). "The rule that the party who is seeking affirmative relief has the burden of proof is one which necessarily underlies all our

procedure." *Se. Sec. Co. v. Christensen*, 66 Idaho 233, 239, 158 P.2d 315, 317 (1945).

In this case, CitiMortgage has asserted an affirmative defense to the effect that U.S. Bank's lien on the subject property must be subordinated to CitiMortgage's because BCT delivered payment of the U.S. Bank Line of Credit and a demand for reconveyance. It is CitiMortgage's burden to prove this defense; not U.S. Bank's burden to disprove it.

ii. The District Court did not set forth sufficient conclusions with regard to the allocation of the burden of proof against CitiMortgage.

It is CitiMortgage's burden to prove delivery of the Release Demand Letter; not U.S. Bank's burden to prove otherwise. The proper application of the burden of proof is critical in this case.

"Burden of proof" encompasses both the burden of production and the burden of persuasion. *Cowan v. Bd. of Comm'rs of Fremont Cnty.*, 143 Idaho 501, 515, 148 P.3d 1247, 1261 (2006).

> "In its strict sense, the term (burden of proof) denotes the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises, whether civil or criminal. In a secondary sense the term 'burden of proof' is used to designate the obligation resting upon a party to meet with evidence a prima facie case created against him that is, the duty of proceeding with evidence at the beginning, or at any subsequent stage, of the trial in order to make or meet a prima facie case. The burden of proof in this secondary sense means, in short, the necessity of going forward with the evidence, and it is sometimes expressed by the term 'burden of evidence.' "

Keenan v. Brooks, 100 Idaho 823, 827, 606 P.2d 473, 477 (1980) (Bistline, J., dissenting) (quoting 29 Am.Jur.2d Evidence s 123 (1967). "The risk of non-persuasion of the trier of the facts never shifts throughout the various stages of the trial. Generally the party asserting the claim bears the 'risk of the nonpersuasion of the trier of the fact.'" *Cole-Collister Fire Prot. Dist. v. City of Boise*, 93 Idaho 558, 569, 468 P.2d 290, 301 (1970).

"The determination of whether proffered evidence sufficiently supports the applicable burden

of proof—whether it be a preponderance of the evidence, clear and convincing evidence or proof beyond a reasonable doubt—is primarily for the trial court. This assumes, of course, that the trial court was aware of the correct burden of proof." *State ex rel. Evans v. Barnett*, 114 Idaho 355, 359, 757 P.2d 218, 222 (Ct. App. 1988) *opinion set aside,* 116 Idaho 429, 776 P.2d 438 (1989).

Despite the critical importance of proper application of the burden of proof in this case, the District Court did not make clear that the burden of proof was considered at all. U.S. Bank briefed the District Court on the critical importance of the burden of proof numerous times. *See* R. 605; R. 860-62; R. 1124-25. Nevertheless, the District Court did not address the burden of proof in this case at any time either on the record or in its written orders. There is no reference or discussion of the burden of proof in the District Court's FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Where the trial court has failed to correctly allocate the burden of proof, the reviewing court will remand for proceedings applying the correct legal standard. *See, e.g., State v. Doe*, 144 Idaho 534, 537, 164 P.3d 814, 817 (2007); *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 954, 812 P.2d 253, 261 (1991) ("Alumet III") [12]. Where, however, "a party with the burden to prove certain facts fails to prove those facts with substantial and competent evidence," reversal is appropriate. *See Evans*, 114 Idaho at 359, 757 P.2d at 222.

iii. The District Court misallocated the burden of proof.

In the District Court's FINDINGS OF FACT AND CONCLUSIONS OF LAW, the majority of the

[12] The *Alumet v. Bear Lake Grazing Co.* case resulted in three separate appeals: first, Alumet v. Bear Lake Grazing Co., 112 Idaho 441, 732 P.2d 679 (Ct. App. 1986) ("*Alumet I*"); second, *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 979, 986, 812 P.2d 286, 293 (Ct. App. 1989) aff'd in part, rev'd in part, 119 Idaho 946, 812 P.2d 253 (1991) ("*Alumet II*"); and *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 952, 812 P.2d 253, 259 (1991) ("*Alumet III*"). *Alumet II* and *Alumet III* are discussed herein.

paragraphs discussing the District Court's findings relevant to whether the Release Demand Letter was delivered do not discuss what CitiMortgage proved, but rather what U.S. Bank failed to prove. This reflects a misallocation of the burden of proof.

On this point, *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 979, 986, 812 P.2d 286, 293 (Ct. App. 1989) ("Alumet II") *aff'd in part, rev'd in part,* 119 Idaho 946, 812 P.2d 253 (1991) (hereinbefore defined as "*Alumet III*") is squarely on point. The *Alumet* case was an action to determine rights in a mineral lease. Following the trial, the trial court entered its findings of fact and conclusions of law. On appeal, Alumet argued that the following passages from the district judge's findings of fact reflected an erroneous allocation of the burden of proof:

> In Finding of Fact No. 14, the judge said, "[T]he record of this case contains no substantial competent evidence ... that a prudent operator in good faith would not be able to mine 1,000,000 tons of ore from the Alumet–Bear Lake leases in a mining season." Similarly, in a memorandum decision preceding the findings of fact, the judge stated, "[T]here is no evidence in the record to support the conclusion that Alumet could not have proceeded with a more extensive mining operation."

Alumet II, 119 Idaho at 985-86, 812 P.2d at 292-93. In *Alumet II*, the Court of Appeals concluded that the trial court correctly understood the burden of proof, noting that the district court's language was merely "unfortunate lapses into double negative phraseology." 985, 812 P.2d at 292. However, this Court reversed the Court of Appeals in *Alumet III*. This Court stated:

> Although misapplication of the burden of proof does not invariably result in prejudice, the use of the words "would not" appears to place the burden of proof of an annual production requirement on Alumet. This is contrary to well-established law in this jurisdiction, and to the majority view held by other jurisdictions.[13]

Alumet III, 119 Idaho at 953, 812 P.2d at 260 (internal citations omitted). This Court then said:

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[13] The burden of proof of an obligation to mine and develop was a critical issue in the *Alumet* case.

> Our review and scrutiny of the record leaves us concerned that the trial court required Alumet to carry the burden to prove that it, as a reasonable prudent mine operator, would *not* be able to mine one million tons of ore from the leased premises during a mining season.

954, 812 P.2d at 261 (emphasis in original). This Court then remanded back to the trial court "for a determination by the trial court of the level of mining required to satisfy the implied covenant based on the evidence with the burden of proof allocated to the lessor." *Id.*

In this case, as in the *Alumet* case, the District Court's findings of fact strongly imply that the District Court imposed a burden of proving non-delivery of the Release Demand Letter upon U.S. Bank. As discussed, the majority of the District Court's findings which bear on this topic focus on the evidence that U.S. Bank, not CitiMortgage, put forth. More specifically, the District Court seemingly focuses on what U.S. Bank did not prove, rather than what CitiMortgage did prove. For example, consider the following passage discussing U.S. Bank's evidence on the critical issue of the staple holes:

> Although Mr. Powers explained U.S. Bank's imaging system, **the evidence fails to explain** how checks are physically moved through the "coffin" or other equipment when they are imaged.

R. 1167 (emphasis added). Because it is CitiMortgage's burden to prove delivery, rather than U.S. Bank's burden to prove non-delivery, the Court's focus on what U.S. Bank's "evidence fails to explain" is misplaced.

4. The District Court erred in admitting and considering the trial testimony of Shannon Pearson.

CitiMortgage's primary trial witness was Shannon Pearson, a paralegal in the employ of CitiMortgage's attorneys Pickens Law, P.A. Over U.S. Bank's objections, the District Court

permitted Ms. Pearson to testify as to her experiment using a blank check and the Pickens Law photocopier/scanner. The District Court erred in admitting this testimony because (1) the experiment to which she testified was not conducted under conditions substantially similar to the actual imaging of the Check, and (2) because it was lay witness opinion based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Even if Ms. Pearson's testimony was properly admitted, the District Court should have afforded it no weight because of the experiment's many dissimilarities to the actual imaging of the Check and because Ms. Pearson did not render an opinion as to the existence of staple holes in the Check at issue in this litigation

i. The admission Ms. Pearson's testimony regarding her experiment was an abuse of discretion because the experiment was not conducted under conditions substantially similar to the actual imaging of the Check.

It is well established that "evidence of an extra-judicial experiment will be excluded unless the conditions under which the experiment was conducted are shown to be substantially similar to those existing at the time the accident occurred." *Lopez v. Allen*, 96 Idaho 866, 871, 538 P.2d 1170, 1175 (1975) (quoting *Hansen v. Howard O. Miller, Inc.*, 93 Idaho 314, 318, 460 P.2d 739, 743 (1969)). "The determination of whether test conditions are sufficiently close to actual conditions is left to the discretion of the trial court and will be reviewed on appeal only upon a showing of an abuse of that discretion." *Stoddard v. Nelson*, 99 Idaho 293, 298, 581 P.2d 339, 344 (1978).

Lopez was an action to recover from personal injuries sustained by a farm employee whose leg was pinned between a potato piler and a tract-drawn scraper unit. The injury occurred when the operator of the tractor shifted into forward gear but the tractor moved backwards several feet and

pinned Lopez's leg. 868, 538 P.2d at 1172. At the trial, the trial court admitted testimony regarding the following experiment conducted by defendant and an expert witness on tractor mechanics:

> One week prior to trial and twenty months after the accident Allen and the witness qualified as an expert mechanic conducted an experiment on the tractor in the potato cellar at the approximate location of the accident. The mechanic adjusted the clutch pulley brake and then Allen and the mechanic experimented with the tractor to determine if the tractor had a tendency to creep. They both testified that the tractor did not creep when the clutch was disengaged while the transmission was shifted from reverse to a forward gear.

871, 538 P.2d at 1175.

Lopez assigned as error the admission into evidence of testimony regarding the experiment because the conditions of the experiment were not substantially similar to the conditions of the accident. 870-71, 538 P.2d 1174-75. This Court identified many concerning variances existing between the original event and the experiment which called into question whether the experiment was performed under substantially similar conditions:

> Here, the record discloses that the experiment was conducted in the same location in the potato cellar. However, a serious question is presented as to **whether the lapse of time between the date of the accident and the time of the experiment** was so long as to effect the validity of the experiment. The **tractor had been used during this period of time, but to what extent was not fully developed** from the record; however the record does disclose **adjustments were made on the clutch during the experiment**. Nor was any issue presented as to the **dissimilarity in the physical capabilities of a thirteen year old youth as compared to an adult admittedly qualified as a tractor expert**. As was pointed out in *Stuchbery v. Harper*, 87 Idaho 12, 390 P.2d 303 (1964), if the trial court determines that the experimental conditions are sufficiently similar so that the evidence will not mislead, but will assist the jury in an intelligent understanding of the issues, the experimental evidence should be admitted. But the converse of such statement is just as true, *i.e.*, if the conditions are not sufficiently similar so that the evidence would mislead the jury, then it should not be admitted.

871, 538 P.2d at 1175 (emphasis added). *See also State v. Johnson*, 96 Idaho 727, 732, 536 P.2d

295, 300 (1975). In light of these inconsistencies, this Court advised that "[u]pon retrial the trial court is directed to give due consideration to the admissibility of the testimony regarding the experiment in light of the evidence presented." *Id.*

In the instant case, it must first be noted that the experiment at issue was not conducted by an expert at all.[14] Furthermore, the conditions of the experiment were completely dissimilar to the original event (*i.e.*, the imaging of the Check by U.S. Bank and First Bank of Idaho). It is undisputed that the experiment used a completely different machine than used by the banks. As established by Mr. Powers's testimony, U.S. Bank used a very specialized machine to image checks:

> A. The imaging process in 2005, U.S. Bank would have employed IBM 3890/97 sorter camera combinations.
>
> These are incredibly expensive machines. They were new technology in 2005. The machines can capture the front and rear image of a check at a rate of about 2,000 items a minute. The machines have a camera module that have highly sophisticated lenses, and those lenses are kept inside, basically, environmental safe boxes where they're humidity controlled, dust controlled and, more importantly, light controlled. So the image snapshot of front and rear of the check would occur inside what we call the coffin or the environmental controlled box where the lenses reside.
>
> Q. So is there a camera on top and a camera below the check?
>
> A. That's exactly right.
>
> Q. And how does it slide? Does it slide on glass or how does it -- how do you get an image of both sides simultaneously?
>
> A. The check is physically forwarded through the equipment on belts and rollers. The image coffin or the box, it's about the size of a shoebox, is glass. And the check simply slides across that glass and then is picked up again at the end of the glass and re-fed through the subsequent rollers and belts.
>
> Q. So -- and then the lights, what kind of lighting is used to take the picture?

[14] As discussed more thoroughly hereinafter, Ms. Pearson was not offered as an expert witness and her experiment constituted inadmissible lay witness opinion outside the scope of IDAHO RULE OF EVIDENCE 701.

> A. The lighting would be a specialized lens, probably a 1500 lumen type lens front and rear. It was a white light in 2005. Technology has changed a little since then, but in 2005 it would have been straight white light.

Tr. 135:14-136:18. Conversely, Ms. Pearson simply used a typical Sharp photocopier/scanner. Tr. 190:07-11. Ms. Pearson had no knowledge of the technical workings of the Pickens Law photocopier and so no foundation was laid as to whether the machine was capable of producing an image at all comparable to the images of the Check or whether the circumstances of the test were similar to the actual imaging of the Check. *See* Tr. 187-206; *see also* p. 19, *infra.*

ii. The District Court abused its discretion by admitting Ms. Pearson's testimony because it was based on scientific, technical or other specialized knowledge within the scope of Rule 702.

As discussed, Ms. Pearson failed to render an opinion as to the staple holes and was therefore provided the District Court with no evidence to consider. However, even if her testimony could be considered as rendering an opinion that the Check had staple holes, that opinion was inadmissible. It is undisputed that Ms. Pearson did not testify as an expert and no foundation was laid which would allow her to do so. Rather, Ms. Pearson testified as a lay witness. I.R.E. 701 discusses lay witness opinions:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, **and** (c) **not based on scientific, technical or other specialized knowledge within the scope of Rule 702**.

(Emphasis added). This Court reviews a trial judge's decision on whether to admit lay opinion testimony under an abuse-of-discretion standard. *Hudelson v. Delta Int'l Mach. Corp.*, 142 Idaho 244, 249, 127 P.3d 147, 152 (2005). However, the commentary and case law surrounding Rule 701

protect against the use of lay witnesses to obtain admission of unreliable or prejudicial experiments. The U.S. Court of Appeals, Third Circuit, aptly explained the analysis in *Asplundh Mfg. Div., a Div. of Asplundh Tree Expert Co. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995)

> However, the admissibility of opinion evidence under the strictures of Rule 701 is not without limit. Rule 701's requirement that the opinion be "rationally based on the perception of the witness" demands more than that the witness have perceived something firsthand; rather, it requires that the witness's perception provide a truly rational basis for his or her opinion. Similarly, the second requirement-that the opinion be "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue"-demands more than that the opinion have a bearing on the issues in the case; in order to be "helpful," an opinion must be reasonably reliable. In other words, Rule 701 requires that a lay opinion witness have a reasonable basis grounded either in *experience or specialized knowledge* for arriving at the opinion that he or she expresses. *See United States v. Paiva*, 892 F.2d 148, 157 (1st Cir. 1989) ("Individual experience and knowledge of a lay witness may establish his or her competence, without qualification as an expert, to express an opinion on a particular subject outside the realm of common knowledge.").
>
> In sum, for lay opinion as to technical matters such as product defect or causation to be admissible, it must derive from a sufficiently qualified source as to be reliable and hence helpful to the jury. In order to satisfy these Rule 701 requirements, the trial judge should rigorously examine the reliability of the lay opinion by ensuring that the witness possesses sufficient special knowledge or experience which is germane to the lay opinion offered. Our decision does not, as suggested by the dissent, "limit the application of Rule 701 to human appearance, human conditions, and, perhaps, vehicle speed and property value," dissent infra at 1214, nor does it eliminate lay opinion as an aid to the jury in technical matters. Rather, as we have stated, a lay witness with first-hand knowledge can offer an opinion akin to *1202 expert testimony in most cases, so long as the trial judge determines that the witness possesses sufficient and relevant specialized knowledge or experience to offer the opinion.

Id. at 1201.

Substantial authority holds that a lay witness may present testimony as to investigatory findings and conclusions reached in the course of that person's regular experience (*i.e.*, job or profession) without being qualified as an expert. In accord with *Asplundh*, *supra*, such testimony is

admissible "not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business." FEDERAL RULE OF CIVIL PROCEDURE 701 advisory committee's note. *See also Jordan v. Nissan North America, Inc.*, 176 Vt. 465, 853 A.2d 40 (Vermont 2004); *Summit Account and Computer Service, Inc. v. RJH of Florida, Inc.*, 690 N.E.2d 723 (Ind. Ct. App. 1998); *Hock v. New York Life Ins. Co.*, 876 P.2d 1242 (Colorado 1994) (*en banc*); *Nunn v. Allen*, 154 N.C. App. 523, 574 S.E.2d 35 (N.C. Ct. App. 2002).

Ms. Pearson's experiment was not an investigation undertaken in the course of her regular experience and it is undisputed that she has no specialized knowledge with regard to check imaging. Ms. Pearson is a simple paralegal and does not deal with check imaging in the regular course of her job. Any knowledge gained by her experiment was not obtained by virtue of her position as a paralegal but rather by an atypical experiment likely conducted at the behest of her employer, Pickens Law, P.A. For these reasons, the District Court abused its discretion by admitting Ms. Pearson's testimony.

iii. If Ms. Pearsons' testimony was admissible, the District Court should have deemed it of no weight because of its many dissimilarities and because Ms. Pearson did not render an opinion as to the existence of staple holes in the Check at issue in this litigation.

"If the conditions [of an experiment] are substantially similar, then the differences in conditions go to the weight of the evidence and not to its admissibility. *Lopez*, 96 Idaho at 871, 538 P.2d at 1175. Even if it was not an abuse of discretion to admit Ms. Pearson's testimony regarding her experiment, it was clearly erroneous to afford it any weight because Ms. Pearson was completely

unable to account for the substantial differences in material, circumstances, and machinery.

Again, it is also critical that Ms. Pearson did not testify with regard to the fact in dispute: whether there are staple holes evident on the images of the Check in this litigation. Throughout the entirety of her testimony, Ms. Pearson only testifies that staple holes are not evident in the scanned image of the Pickens Law check. She does not offer any opinion to the effect that her experiment has any bearing on whether holes are visible in the image of the Check in question.

Accordingly, Ms. Pearson's testimony did not provide any "substantial or competent evidence" upon which the District Court could have relied in finding delivery of the Release Demand Letter.

5. The District Court committed clear error in finding that the Release Demand Letter was stapled to the Check and delivered to U.S. Bank on November 29, 2005.

U.S. Bank adduced substantial, competent, compelling, and almost entirely uncontradicted evidence in this case supporting the conclusion that the Release Demand Letter was not delivered by BCT in November 2005.

"[W]here there is any doubt on which side the evidence preponderates, the party having the burden of proof fails upon that issue." *Whalen*, 46 Idaho 181, 266 P. at 1092. "[E]vidence, uncontradicted, must be accepted as true." *Swanson v. State,* 114 Idaho 607, 609, 759 P.2d 898, 900 (1988); *see also Dinneen v. Finch,* 100 Idaho 620, 603 P.2d 575 (1979); *Pierstorff v. Gray's Auto Shop,* 58 Idaho 438, 74 P.2d 171 (1937)). A trial court is bound to accept uncontradicted evidence unless it is inherently improbably. *See Pierstorff*, 58 Idaho at 447-448, 74 P.2d at 175.

The testimony of Keith Powers provides compelling evidence that there are no staple holes in

the images of the Check. *See* Tr. 123-171; *see also* R. 636-53; *see also* p. 17, ¶ 6.ii, *infra*. Mr. Powers thoroughly examined the images of the Check, provided comparative images that do show staple holes, and concluded that there were no staple holes visible on the check.

On the other hand, CitiMortgage's only evidence with regard to the staple holes was the inadmissible and irrelevant testimony of Shannon Pearson.

Furthermore,[15] U.S. Bank has demonstrated in every possible way that the Release Demand Letter never arrived by setting forth the following *uncontradicted* facts: (1) Staple marks are clearly evident and distinct from dust specks on the comparative bank-imaged checks provided by U.S. Bank; (2) No U.S. Bank employee has been located who has any memory of receiving the Release Demand Letter; (3) No one at BCT recalls delivering the Release Demand Letter; (4) The Release Demand Letter is undated; (5) BCT was conducting more transactions than at any time in its history at the time in question; (6) BCT obtained a formal payoff statement from PHH Mortgage Services, but not U.S. Bank; (7) BCT never took any subsequent action to obtain reconveyance of the U.S. Bank Deed of Trust; (8) The demands for reconveyance which were delivered by Federal Express to PHH Mortgage Services arrived at their destination with no problems; (9) BCT was under pressure to quickly close the CitiMortgage Loan Transaction; (10) BCT has no proof of delivery of the Release Demand Letter; (11) U.S. Bank does have procedures for receiving and filing checks and related loan documentation; and (12) The Release Demand Letter is the only document alleged to be missing from U.S. Bank's records regarding this loan

On the other hand, the only proof offered by CitiMortgage in support of its affirmative

[15] *See* p. 21, ¶ C.7, *infra*.

defense that the Release Demand Letter was delivered is the irrelevant and inadmissible testimony of Ms. Pearson and an email between U.S. Bank personnel discussing HELOC controls. As to the latter, the District Court relied upon a line in the email which states "We didn't have the controls like we do today on HELOCS." However, CitiMortgage offered no context for that statement and, absent evidence to the contrary, the District Court had no cause to infer that the lack of HELOC "controls" affected U.S. Bank's record receipt and keeping. As discussed, U.S. Bank's document receipt procedures are well-established and CitiMortgage adduced no evidence to suggest that the procedures were at all different for HELOCS.

Given the relative quality and quantity of the evidence in this case, it cannot be said that CitiMortgage met its burden of proof or that the District Court's finding that the Release Demand Letter was delivered is based upon substantial and competent evidence. Accordingly, U.S. Bank respectfully requests that this Court reverse the District Court's ruling that U.S. Bank's Deed of Trust be subordinated to the CitiMortgage Deed of Trust or, alternatively, remand this case back to the District Court with instructions to properly apply all of the facts in the record in light of the correct allocation of the burden of proof.

B. The Release Demand Letter was ineffective as a demand for reconveyance for failure to comply with I.C. § 45-1203.

Even if the Release demand Letter had been received, U.S. Bank's duty to reconvey under I.C. § 45-915 and 45-1514 would not have been triggered because the Release demand Letter was ineffective as a demand for reconveyance for failure to comply with I.C. § 45-1203.

I.C. § 45-1203 provides the form for a demand for reconveyance. Such demands "shall be

in substantially" the form set forth therein and "shall be accompanied by a copy of the reconveyance to be recorded." (Emphasis added). The statute requires that a demand for reconveyance "shall" be dated and contain certain disclosures.

However, in this case it is uncontradicted that the Release Demand Letter fails to satisfy these conditions. A review of the Release Demand Letter reveals that it was undated and failed to set forth the statutory disclosures set forth in Paragraphs 1, 2, 3 and 4 of I.C. § 45-1203. Further, CitiMortgage has not alleged or proven that the Release Demand Letter was attached to a copy of the U.S. Bank Deed of Trust.

When used in a statute, the words "must" or "shall" carry "imperative or mandatory meaning," whereas "the word 'may' is permissive." *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995). Moreover, these statutory requirements are vital because they are designed to notify the recipient of (1) its right to object to the demand and (2) that the title company closing the relevant transaction has no authority to reconvey the deed of trust until such rights are granted pursuant to the statute.

Accordingly, even if the Release Demand Letter was delivered, U.S. Bank was nevertheless under no obligation to reconvey the Deed of Trust. Therefore, U.S. Bank respectfully requests that the Court reverse the District Court's ruling that U.S. Bank's Deed of Trust be subordinated to the CitiMortgage Deed of Trust.

CONCLUSION

For the reasons set forth hereinabove, U.S. Bank respectfully requests that the Court reverse the District Court's ruling that U.S. Bank's Deed of Trust be subordinated to the CitiMortgage Deed

of Trust

DATED this 27th day of November, 2013.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 2013, I caused a true and accurate copy of the foregoing document to be served upon the following individual, by the method indicated, and addressed as follows:

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